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OFFICE OF PETITIONS

In re Application of	:	
Kouji Arai et al.	:	
Application No. 10/635,764	:	DECISION ON RENEWED PETITION
Filed: August 5, 2003	:	UNDER 37 C.F.R. §1.181(A)
Attorney Docket Number: 16869P-	:	
006210US	:	
Title: SYSTEM AND METHOD FOR	:	
REPLICATING DATA	:	

This is a decision on the renewed petition under 37 CFR §1.181(a), filed April 11, 2006, to withdraw the holding of abandonment.

BACKGROUND

The above-identified application became abandoned for failure to submit the issue and publication fees in a timely manner in reply to the Notice of Allowance and Issue Fee Due, mailed August 2, 2005, which set a shortened statutory period for reply of three (3) months. No extensions of time are permitted for transmitting issue fees or publication fees¹. Accordingly, the above-identified application became abandoned on November 3, 2005. A Notice of Abandonment was mailed on December 19, 2005.

With the original petition, Petitioner asserted that the Notice of Allowance and Issue Fee Due was never received. Petitioner included a copy of his docket report, and set forth that a review of both the docket records and the file jacket has not resulted in the location of this notice.

¹ See MPEP §710.02(e).

RELEVANT PORTION OF THE MPEP

MPEP 711.03(c) states, in part:

PETITION TO WITHDRAW HOLDING OF ABANDONMENT BASED ON FAILURE TO
RECEIVE OFFICE ACTION

In *Delgar v. Schulyer*, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of *Delgar*, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of *Delgar* is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133).

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions).

Evidence of nonreceipt of an Office communication or action (e.g., Notice of Abandonment or an advisory action) other than that action to which reply was required to avoid abandonment would not warrant withdrawal of the holding of abandonment. Abandonment takes place by operation of law for failure to reply to an Office action or timely pay the issue fee, not by operation of the mailing of a Notice of Abandonment. See *Lorenz v. Finkl*, 333 F.2d 885, 889-90, 142 USPQ 26, 29-30 (CCPA 1964); *Krahn v. Commissioner*, 15 USPQ2d 1823, 1824 (E.D. Va 1990); *In re Application of Fischer*, 6 USPQ2d 1573, 1574 (Comm'r Pat. 1988).

Two additional procedures are available for reviving an application that has become abandoned due to a failure to reply to an Office Action: (1) a petition under 37 CFR 1.137(a) based upon unavoidable delay; and (2) a petition under 37 CFR 1.137(b) based on unintentional delay.

ANALYSIS

The original petition was submitted on January 9, 2006, along with a statement that the Office communication was not received and that he searched the file jacket and the docket records. Petitioner also submitted a copy of the docket records. The petition was dismissed via the mailing of a decision on March 3, 2006, as the relevant portions of the docket records were not legible.

With this renewed petition, a fully legible copy of the docket records has been provided.

CONCLUSION

Accordingly, the petition under 37 C.F.R. §1.181(a) is GRANTED. The holding of abandonment is WITHDRAWN.

The Technology Center will be notified of this decision. The Technology Center's support staff will mail a new Notice of Allowance and Issue Fee Due, as well as a copy of the Notice of Allowability. The three-month non-extendable time period for paying the issue and publication fees will be set to run from the mailing date of the Notice.

Telephone inquiries regarding this decision should be directed to the undersigned at (571) 272-3225. All other inquiries concerning examination procedures or status of the application should be directed to the Technology Center.



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